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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

~~72-~~ 1277

October Term, 1972

No. .....

ROBERT V. RAFTER,

Petitioner,

v.

FLOYD BLACKMON and KOIZIM & DAVIDOFF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT V. RAFTER,
Counsel for Petitioner,
Post Office Address,
120 Liberty Street,
New York, New York 10006.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Opinions Below

The opinion of the United States District Court for the District of Connecticut (R. C. Zampano, U. S. D. J.) is set forth at page A12 of the appendix below and is not officially reported. No opinion was rendered by the United States Court of Appeals either in affirming the district court or in denying the Rule 27(b) motion (A2, A4).

Jurisdiction

The order of the Court of Appeals was made and entered the 19th day of December, 1972 (A1). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Should the Court of Appeals grant recall of its mandate and reargument of the appeal upon constraint of recent Supreme Court decisions (*Lynch v. Household Finance Corp.*, 405 U. S. 538, 92 S. Ct. 1113, rehearing denied 92 S. Ct. 1611, April 26, 1972; *Fuentes v. Shevin*, 407 U. S. 67, 32 L. Ed. 2d 556, decided June 12, 1972).

2. Is the denial of recall and reargument contrary to the supreme law of the land.

3. Is the denial in violation of the due process clause of the Fifth Amendment.

Statutes Involved

The constitutional and statutory provisions which are relevant to decision of this case, and the pertinent text of which is appended hereto, are the Fifth Amendment to the Constitution of the United States, Rule 27(b) of the Rules of the United States Court of Appeals for the Second Circuit, 28 U. S. C. 1343 and 42 U. S. C. 1983 and 1985.

Statement

The instant case involves prejudgment garnishment and attachment under the statutes of Connecticut. Petitioner brought the action in May of 1966 against the deputy sheriff, who attached the property, and against the lawyers (Commissioners of the Superior Court), who issued the writs of attachment. Jurisdiction is alleged under 28 U. S. C. 1343 and 42 U. S. 1983 and 1985 (A21, A22).

Judge Zampano dismissed the complaint (A18), holding that:

1. Reliance upon 1983 is misplaced (A13);
2. The acts of an attorney (Commissioner of the Superior Court) are not done under color of state authority (A14);
3. A deputy sheriff is within a class of judicial officers that is immune from suit under the Civil Rights Act (A15);
4. No act of the deputy sheriff may be construed to have violated a right guaranteed to the plaintiff by any federal law or by the federal constitution (A15).

The Court of Appeals affirmed without opinion (A19).

Petitioner moved for recall and reargument (A1), pursuant to Rule 27(b) of the Rules of the Court of Appeals, based upon the recent decisions of this Court in *Lynch v. Household Finance Corp.* and *Fuentes v. Shevin.* The Court of Appeals denied the motion without opinion (A1).

Reasons for Granting the Writ

1. The district court, in disclaiming jurisdiction, has deprived petitioner of his constitutional rights.

2. The decision and judgment of the U. S. District Court are contrary to *Lynch*, *Fuentes* and *Sniadach*.

3. The Court of Appeals order of affirmance is also contrary to *Lynch*, *Fuentes* and *Sniadach*.

4. The Court of Appeals under Rule 27(b) has the power to recall its mandate and to grant reargument to correct its error.[1]

5. In the case of *Tucker v. Maher*, 405 U. S. 1052, 92 S. Ct. 1489 (1972), involving a Connecticut attachment, the Supreme Court remanded the matter to the Court of Appeals for further proceedings consistent with *Lynch*, stating:

> April 17, 1972. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted, judgment vacated and cases remanded to the Court of Appeals for further consideration in light of Lynch v. Household Finance Corp., 405 U. S. ——, 92 S. Ct. 1113, 31 L. Ed. 2d —— (1972).

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[1] It appears that state courts also follow these procedures, as in *Liberty Nat. Bank and Trust Company v. Buscaglia*, 23 N. Y. (2) 933, 298 N. Y. S. (2) 513, February 19, 1969, where, upon reargument on constitutional grounds two years after the appeal, the lower court order was reversed, the court stating:

> Upon reargument: order affirmed, without costs, *upon constraint* of recent Supreme Court decisions (*Dickinson v. First Nat. Bank of Homestead*, 393 U. S. 409, 89 S. Ct. 685, 21 L. Ed. 2d 634, decided Jan 20, 1969; *First Agric. Nat. Bank of Berkshire County v. State Tax Comm.*, 392 U. S. 339, 88 S. Ct. 2173, 20 L. Ed. 2d 1138).
>
> All concur.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT V. RAFTER,
Counsel for Petitioner.

APPENDIX

Order of the United States Court of Appeals Denying Rule 27(b) Motion

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of December, one thousand nine hundred and seventy-two.

ROBERT V. RAFTER,
Plaintiff-Appellant,

v.

FLOYD BLACKMON and KOIZIM & DAVIDOFF,
Defendants-Appellees.

It is hereby ordered that the motion made herein by the appellant *pro-se* by notice of motion dated November 29, 1972, to recall the mandate of this Court issued November 30, 1967 to the United States District Court for the District of Connecticut; to reinstate the appeal; and to modify or vacate the judgment of this Court; and for leave to reargue, orally, the appeal denied.

Denied.

J. EDWARD LUMBARD,
HAROLD R. MEDINA,
PAUL R. HAYS,
Circuit Judges.

Notice of Motion for Rule 27(b) Order

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 31477

ROBERT V. RAFTER,
Plaintiff-Appellant,

against

FLOYD BLACKMON and KOIZIM & DAVIDOFF,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

Sirs:

PLEASE TAKE NOTICE, that upon the annexed affidavit of ROBERT V. RAFTER, sworn to the 29th day of November, 1972, and upon the exhibits annexed thereto the undersigned will move this Court at a motion term thereof to be held at the U. S. Courthouse, Foley Square, New York, New York, on the 5th day of December, 1972, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 27(b) of the Rules of this Court granting a recall, modification and reargument with respect to the mandate and decision

entered by this Court the ninth day of November, 1967, and upon the recall and reargument, for an order reinstating the action before the U. S. District Court for the District of Connecticut and reversing the decision and order of the Hon. Robert C. Zampano dated April 26, 1967, and vacating and setting aside the District Court order and judgment entered thereon the 27th day of April, 1967, and for such other process and relief as to the Court may seem just and equitable.

Dated: New York, New York, November 29, 1972.

Yours, etc.,

ROBERT V. RAFTER,
Attorney for Plaintiff-Appellant,
120 Liberty Street,
New York, New York,
Tel. 962-0248.

To:

Wilson, Asbel & Channin,
Attorneys for Appellee Floyd Blackmon,
100 Constitution Plaza,
Hartford, Connecticut.

Pullman, Comley, Bradley & Reeves,
Attorneys for Appellee Koizim & Davidoff,
855 Main Street,
Bridgeport, Connecticut.

Affidavit in Support of Rule 27(b) Motion

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 31477

ROBERT V. RAFTER,
Plaintiff-Appellant,

against

FLOYD BLACKMON and KOIZIM & DAVIDOFF,
Defendants-Appellees.

State of New York,
County of New York. } ss.:

ROBERT V. RAFTER, being duly sworn, deposes and says:

He is the plaintiff above named and is an attorney at law duly admitted to practice before the United States District Court for the Southern District of New York and the Supreme Court of the State of New York.

He makes this affidavit in support of the instant motion for an order pursuant to Rule 27(b) of this Court granting a recall, modification and reargument with respect to the mandate and decision entered by this Court the ninth day of November, 1967, and, upon the recall and reargument, for an order reinstating the action before the U. S. District Court for the District of Connecticut and reversing the

decision and order of the Hon. Robert C. Zampano dated the 26th day of April, 1967, and vacating and setting aside the order and judgment entered thereon the 27th day of April, 1967, dismissing the action, and for such other and further relief as to the Court may seem just and equitable.

The basis for this motion for recall is the recent United States Supreme Court decision in *Lynch v. Household Finance Corporation*, 405 U. S. 538, 92 S. Ct. 1113, rehearing denied 92 S. Ct. 1611, April 16, 1972, and *Fuentes v. Shevin*, 32 L Ed (2) 556, decided June 12, 1972.

I

The *Lynch* action stemmed from 42 U. S. C. 1983 and 28 U. S. C. 1343, and sought equitable relief and damages for wrongful prejudgment garnishment under Connecticut statutes, claiming the prejudgment seizure was contrary to the fourteenth amendment within the rule of *Sniadach v. Family Finance Co.*, 395 U. S. 337, decided June 9, 1969.

The U. S. District Court for the District of Connecticut, Judges Zampano, Timbers and Anderson, dismissed for lack of jurisdiction.

The Supreme Court of the United States reversed, Mr. Justice Steward stating[1] that Title 42, section 1983, and its jurisdictional supplement, 28 U. S. C. 1343, provided authority for the suit, and resolving[2] that:

> . . . the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the

[1] At page 1117 and 1124.

[2] Page 1122.

> right to speak or the right to travel, is in truth a 'personal right', whether the 'property' in question be a welfare check, a home or a savings account.

The Supreme Court also cited *U. S. v. Price,* 383 U. S. 787, 797 in definition of the scope of section 1983.[3]

The *Lynch* case named as defendants the deputy sheriff, who seized the property, and the lawyers (Commissioners of the Superior Court) who issued the writs of garnishment.[4]

II

The instant case was commenced in May of 1966. The jurisdictional basis is 42 U. S. C. 1983 and 1985 and 28 U. S. C. 1343.[5]

Invalid writs of attachment and garnishment are alleged at paragraphs EIGHTH and TENTH of the complaint.[6]

Named as defendants are Deputy Sheriff Floyd Blackmon, who seized the property, and Koizim & Davidoff, who issued the writs through their employee, Vincent Tirola (Commissioner of the Superior Court).

Judge Zampano dismissed the complaint for lack of jurisdiction and held as follows:[7]

1. Reliance on section 1983 is misplaced.
2. The acts of an attorney (Commissioner of the Superior Court) are not done under color of state authority.

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[3] Page 1120, note 16, and p. 1118, note 9.

[4] See 318 Fed. Supp. 1111.

[5] Exhibit A annexed.

[6] Same.

[7] Exhibit B annexed.

3. A deputy sheriff is within a class of judicial officers that is immune from suit under the Civil Rights Act.
4. No act of the deputy sheriff may be construed to have violated a right guaranteed to the plaintiff by any federal law or by the federal constitution.

The Court of Appeals for the Second Circuit affirmed without opinion, copy annexed, Exhibit D.

Clearly the U. S. District Court has jurisdiction under 42 U. S. C. 1983 and 28 U. S. C. 1343. It is clear also that the prejudgment garnishment and attachment under the Connecticut statutes is unconstitutional,[8] and the unlawful seizure is actionable in a suit against the deputy sheriff.

WHEREFORE, deponent requests an order pursuant to Rule 27(b) of this Court recalling and modifying the decision and mandate of this Court and granting reargument, and upon the reargument, granting a further order vacating and setting aside the order of this Court entered November 9, 1967, and further vacating and setting aside the judgment and order of dismissal entered in the U. S. District Court for the District of Connecticut, and directing that the action be reinstated forthwith, and for such other and further relief and process as to the Court shall seem just and proper.

ROBERT V. RAFTER.

Subscribed and sworn to before
me this 29th day of November, 1972.

.....

[8] *Fuentes v. Shevin*, 32 L Ed (2) 556, Mr. Justice Stewart stating at p. 574:

> This reading of Sniadach and Goldberg reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.
>
> *Sniadach v. Family Finance Co.*, 395 U. S. 337.

Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil No. 11458

ROBERT V. RAFTER,

Plaintiff,

against

FLOYD BLACKMON and KOIZIM & DAVIDOFF,

Defendants.

ROBERT V. RAFTER, the plaintiff above named, appearing *pro se,* for his complaint herein alleges:

First: This action arises pursuant to the provisions of Title 42 U. S. C., Sections 1983 and 1985.

Second: Jurisdiction is invoked under the provisions of Title 28 U. S. C., Section 1343.

Third: At all times hereinafter mentioned plaintiff was a citizen of the United States, domiciled in Weston, Connecticut.

Fourth: At all times hereinafter mentioned the defendant, Floyd Blackmon, was a deputy sheriff for the County of Fairfield, State of Connecticut, residing in Fairfield, Connecticut.

Fifth: At all times hereinafter mentioned the defendant, Koizim & Davidoff, was a law partnership having offices in the City of Westport, Connecticut.

Sixth: Defendants and others conspired for the purpose of impeding, hindering, obstructing, or defeating the due course of justice in the State of Connecticut, with the intent to deny plaintiff the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce his right to the equal protection of the laws.

Seventh: Defendants and others acting jointly under color of the statutes of the State of Connecticut subjected the plaintiff, or caused the plaintiff to be subjected, to the deprivation of rights, privileges, and immunities secured by the Constitution of the United States including but not limited to those rights, privileges, and immunities secured by the Fourth, Fifth, and Fourteenth Amendments of the Constitution.

Eighth: Defendants and others acting in concert pursuant to the conspiracy aforesaid and in furtherance of said conspiracy performed the following overt acts, *inter alia:*

(a) On December 10, 1964, caused an invalid writ of attachment to issue in a certain civil action before the Court of Common Pleas for the County of Fairfield held at Stamford, Connecticut, bearing Index Number 5845-1964;

(b) Wrongfully seized and took possession of property of plaintiff on December 17, 1964, and deprived him of the use and possession thereof;

(c) Through collusion, misrepresentation, deceit and fraudulent legal proceedings before the said Court of Common Pleas deprived plaintiff of his right to vacate the said writ of attachment during the period from December 1964 to April 1965;

(d) Wrongfully failed and refused to return plaintiff's property after the Court of Common Pleas determined that the writ of attachment was defective and denied motions to amend the process;

(e) Wrongfully removed plaintiff's property from its place of custody and concealed same;

(f) Wrongfully seized and took possession of plaintiff's property pursuant to a writ of attachment issued May 12, 1965, in a certain action before the said Court of Common Pleas, bearing Index Number 6174-1965;

(g) Wrongfully caused plaintiff's property to be seized and sold on or about the 1st day of June, 1965, by the Fairfield County Trust Company of Norwalk, Connecticut;

(h) Refused to appear or testify pursuant to summons duly served on December 29, 1964, before the Court of Common Pleas for the County of Fairfield held at Bridgeport, Connecticut, and performed acts of perjury and subordination of perjury on December 29, 1964, and March 28, 1966, in furtherance of said conspiracy and joint action and for the purpose of concealing the conspiracy herein alleged and the joint action of the defendants and other persons.

Ninth: That the said conspiracy and the overt acts pursuant thereto were the result of joint action between and

among the defendant law firm, its principals, partners, agents and employees, and the State of Connecticut or its agents, and other persons.

Tenth: That by reason of said conspiracy and joint action the due course of justice in the State of Connecticut has been impeded, hindered, obstructed or defeated, and plaintiff has been injured in his person and property and has been deprived of rights, privileges, and immunities secured by the Constitution of the United States and denied equal protection of the laws, including, but not limited to, the right not to be deprived of property without due process of law.

WHEREFORE, plaintiff demands damages in the sum of Fifty Thousand Dollars, together with interest and costs.

Dated: May 29, 1966.

ROBERT V. RAFTER,
Attorney for Plaintiff,
10 Old Rock Road,
Weston, Connecticut.

Decision of United States District Court for the District of Connecticut

(Same Title.)

This action was instituted by the plaintiff pursuant to 42 U. S. C. §§ 1983 and 1985 for damages as a result of an alleged violation of his civil rights. After extensive pretrial proceedings by the parties, the defendants now move for summary judgment. Rule 56, Federal Rules of Civil Procedure.

The material facts are not in dispute, although the parties vigorously contest the legal conclusions to be drawn therefrom. Prior to December 10, 1964, the plaintiff, an attorney who is now a resident of Connecticut, rented a house from one Leo Spiegelman. A dispute arose over the payment of rent and alleged damage to the real and personal property owned by Spiegelman. In December, 1964, Spiegelman retained attorney Vincent S. Tirola, a Connecticut attorney, to institute suit against the plaintiff. At the time, Tirola was associated with the law firm of the defendants, Koizim and Davidoff, in Westport, Connecticut.

On December 10, 1964, Tirola issued a writ, summons and complaint, returnable to the Court of Common Pleas for Fairfield County at Stamford on the second Tuesday of January, 1965, in behalf of Spiegelman as plaintiff naming Robert V. Rafter, an attorney, defendant. Process was transmitted to Deputy Sheriff Blackmon (a defendant in the instant action) with instructions to make appropriate attachments and garnishments to the value of $3,000 and to thereafter serve Rafter. Blackmon garnished approximately $200 in the Fairfield County Trust Company of

Norwalk, Connecticut and attached Rafter's 1964 Ford automobile. A copy of the writ, summons and complaint was served upon Rafter and the original pleadings were duly filed. After numerous motions were filed and ruled upon, Koizim and Davidoff withdrew the action on May 13, 1965. On the same day, an identical suit against Rafter was commenced, in which the same attachment and garnishment were made. This second case is presently pending in the state court.

On May 31, 1966, Rafter instituted the instant action. In essence, he claims defendants Koizim, Davidoff and Blackmon conspired to deprive him of his civil rights by issuing and executing an invalid writ of attachment, wrongfully withdrawing the first state law suit, wrongfully removing his property, improperly reattaching his automobile by the institution of the second state law suit and committing perjury in testimony before the Court of Common Pleas.

I.

On these facts the plaintiff's reliance on the provisions of the Civil Rights Act is misplaced. Section 1983[1] imposes civil liability only if 1) the persons accused acted under the color of state law, and 2) the actions complained of infringe a federal constitutional or statutory right. *Monroe v. Pape,*

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U. S. C. § 1983.

365 U. S. 167 (1961); *Travers v. Paton*, 261 F. Supp. 110, 112 (D. Conn. 1966). Its criminal counterparts are set forth in 18 U. S. C. § 241[2] and § 242.[3] Section 1985 of the Act provides civil redress where there is a conspiracy to interfere with civil rights.

It is now established that the professional acts of an attorney during the course of private state court civil litigation are not considered acts done under color of state authority. *Cooper v. Wilson*, 309 F. 2d 153, 154 (6 Cir. 1962); *Pritt v. Johnson*, 264 F. Supp. 167, 169 (M. D. Pa. 1967); *Kregger v. Posner*, 248 F. Supp. 804, 806 (E. D. Mich. 1966); *Pugliano v. Staziak*, 231 F. Supp. 347, 351 (W. D. Pa. 1964), aff'd, 345 F. 2d 797 (3 Cir. 1965).

It is clear also that a deputy sheriff, acting merely in the ministerial capacity of process server in a state civil

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[2] "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secure—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U. S. C. § 241.

[3] "Whoever, under color of any law, statute ordinance regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both." 18 U.S.C. § 242.

suit pursuant to the instructions of an attorney, is within a class of judicial officers or quasi-judicial officers that is immune from suit under the Civil Rights Act. *Thompson v. Baker*, 133 F. Supp. 247, 251-253 (W. D. Ark. 1955); *Rhodes v. Meyer*, 334 F. 2d 709, 717-718 (8 Cir. 1964), cert. denied, 379 U. S. 915 (1964); *Nelson v. Hall*, 368 F. 2d 103, 107 (9 Cir. 1966); *cf. Harmon v. Superior Court of State of California*, 329 F. 2d 154 (9 Cir. 1964); *Schackman v. Arnebergh*, 258 F. Supp. 983, 993 (C. D. Calif. 1966); *Gabbard v. Rose*, 359 F. 2d 182 (6 Cir. 1966); *Hardy v. Kirchner*, 232 F. Supp. 751 (E. D. Pa. 1964); *Ginsburg v. Stern*, 125 F. Supp. 596 (W. D. Pa. 1954), aff'd, 225 F. 2d 245. Moreover, a review of the pleadings, depositions, exhibits and moving papers in this case fails to disclose any act on the part of the defendant Blackmon which may be construed to have violated a right guaranteed to the plaintiff by any federal law or by the federal constitution. The procedural and typographical errors alleged are mere technical irregularities, which even if true, indicate only that state law has not been followed. *Screws v. United States*, 325 U. S. 91, 108-109 (1945); *Nelson v. Hall, supra; Skolnick v. Spolar*, 317 F. 2d 857 (7 Cir. 1963), cert. denied, 375 U. S. 904 (1963); *Thompson v. Baker, supra* at 250-251; *Sarelas v. Sheehan*, 326 F. 2d 490, 491 (7 Cir. 1963).

There is no basis in the record to support a cause of action based on conspiracy. General conclusionary allegations unsupported by facts have been consistently rejected as insufficient to constitute a claim under the Civil Rights Act. *United State ex rel. Hoge v. Bolsinger*, 311

F. 2d 215, 216 (3 Cir. 1962), cert. denied, 372 U. S. 931 (1963); *Morgan v. Sylvester*, 125 F. Supp. 380, 389-390 (S. D. N. Y. 1954), aff'd, 220 F. 2d 758 (2 Cir. 1955), cert. denied, 350 U. S. 867 (1955); *Mattheis v. Hoyt*, 136 F. Supp. 119 (W. D. Mich. 1955).

Plaintiff's final contention that jurisdiction may be founded under sections 241 and 242 is without merit. These sections provide for criminal penalties and may not be used as basis for civil actions. *Sinchak v. Parente*, 262 F. Supp. 79, 82 (W. D. Pa. 1966); *Pugliano v. Staziak*, *supra*.

II.

Since these rulings are dispositive of the action, it would not ordinarily be necessary to reach the merits of the plaintiff's claims. However, since hereinbefore this Court assumed certain acts of the defendants might be violations of state law, a further comment is not inappropriate. *Travers v. Paton*, *supra*, 261 F. Supp. at 116.

The main thrust of the plaintiff's claim concerns the alleged invalidity of the 1964 writ of attachment. It is not disputed that the defendant Blackmon, pursuant to the express written authority of the other defendants, inserted the name of the garnishee bank in the body of the writ prior to the service of process upon the plaintiff. Under Connecticut procedure this is the usual practice when garnishment is made. No authority has been cited by the plaintiff, nor has the Court found any, which prohibits or is critical of this long established practice. Moreover,

section 52-127 of the Connecticut General Statutes provides in part that "no process shall abate on account of any alteration thereof between the signing and the service of the same." The 1964 writ of attachment, therefore, was not void, invalid or falsified, as the plaintiff claims. *Milestan v. Tisi,* 140 Conn. 464, 472 (1953).

Plaintiff further argues the defendant sheriff was prohibited by state law from taking the automobile into his personal possession. The law is to the contrary. See *Gray v. Bracken,* 107 Conn. 300 (1928). In addition, there is no statutory or case law which proscribes immediate reattachment upon the release of an original attachment.

The technical errors in the return date of the writ and in the copy served upon the plaintiff do not render the process void. Circumstantial defects do not void process in Connecticut, section 51-123, and, in any event, amendments are freely granted to cure technical defects. Conn. Gen. Stats. § 52-125; *Dunnett v. Thornton,* 73 Conn. 1 (1900); *New Haven Loan Co. v. Affinito,* 122 Conn. 151 (1936); *Gimbel v. Gimbel,* 147 Conn. 561 (1960).

Accordingly, the defendants' motions for summary judgment are granted.

Dated at New Haven, Connecticut this 26th day of April, 1967.

Judgment of the United States District Court

(Same Title.)

This action came on for hearing before the Court, Honorable Robert C. Zampano, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motions for summary judgment are granted; that the plaintiff take nothing; that this action is hereby dismissed; and that defendants have their costs of action.

Dated at New Haven, Connecticut, this 27th day of April, 1967.

GILBERT C. EARL,
Clerk of Court,

(SEAL)

By THOMAS A. GRIMES,
Chief Deputy Clerk.

Order of the United States Court of Appeals Affirming the Dismissal.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November, one thousand nine hundred and sixty-seven.

Present: Hon. J. Edward Lumbard, *Chief Judge*,
Hon. Harold R. Medina,
Hon. Paul R. Hays,
Circuit Judges.

ROBERT V. RAFTER,
Plaintiff-Appellant,

v.

FLOYD BLACKMON and KOIZIM & DAVIDOFF,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellees Koizim and Davidoff, Esqs.

A. DAVID FASERO,
Clerk.

Constitution, Amendment V
Rule 27(b), Rules of the United States Court of Appeals for the Second Circuit

CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

RULE 27(B), RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(b) MOTIONS TO BE HEARD BY A PANEL WHICH HAS RENDERED A DECISION. Motions addressed to a previous decision or order of the court or for the stay, recall or modification of any mandate or decision of the court or to withdraw or dismiss an appeal argued but not decided shall be referred by the clerk to the judges who heard the appeal, normally without oral argument.

Title 28 U. S. C. 1343

TITLE 28 U. S. C.

§ 1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. As amended Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637.

Title 42 U. S. C. 1983, 1985

TITLE 42 U. S. C.

§ 1983. CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R. S. § 1979.

§ 1985. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS—PREVENTING OFFICER FROM PERFORMING DUTIES

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or

threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

R. S. § 1980.

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APR 12 197

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1277

ROBERT V. RAFTER,

Petitioner,

v.

FLOYD BLACKMON and KOIZIM & DAVIDOFF,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JEFFREY M. MINES
Counsel for Respondent
Floyd Blackmon

Post Office Address,
100 Constitution Plaza
Hartford, Connecticut 06103

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QUESTIONS PRESENTED

1. Is the Petition for Writ of Certiorari timely?

2. Does the decision of the Supreme Court in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 92 S. Ct. 1113, rehearing denied 92 S. Ct. 1611 (1972) so change the law of this case that a new hearing is warranted?

STATEMENT

The statement set forth in petitioner's brief Page 3 and in Judge Zampano's decision cited in petitioner's brief Page A12, 13 sufficiently state the facts except for one material point.

Petitioner in his statement of facts on Page 3 states that, "Judge Zampano dismissed the complaint". This is incorrect, in fact, Judge Zampano granted Respondents Motion for Summary Judgment. (Petitioner's brief A18)

ARGUMENT

I. IS THE PETITION FOR WRIT OF CERTIORARI TIMELY?

On April 27, 1967 Respondents Motion for Summary Judgment was granted by the Honorable Robert C. Zampano (Petitioner's brief A18). Petitioner appealed from the granting of the Motion for Summary Judgment to the United States Court of Appeals for the Second Circuit. The case was argued and decided on November 9, 1967 and the judgment of the district court for Connecticut was affirmed.

A writ of certiorari intending to bring any judgment or decree in any civil action before the Supreme Court for review must be taken or applied for within 90 days after the

entry of said judgment or decree. This 90 day period may be extended by a Justice of the Supreme Court for a period not exceeding 60 additional days. 28 U.S.C. Sec. 2101 (C). No petition or writ of certiorari was brought by the petitioner within either 90 days or an additional 60 days after judgment of the United States Court of Appeals.

Petitioner attempts to circumvent this rule by means of making a Motion for Recall, which Motion was made on November 29, 1972 to the United States Court of Appeals pursuant to Rule 27(B) (Petitioner's Brief A4-7). This Motion was denied by the United States Court of Appeals on December 19, 1972. (Petitioner's Brief A1).

It is from the denial of this Motion that Petitioner seeks a writ of certiorari.

Petitioner's Motion under Rule 27(B) for recall was and is an inappropriate way to seek a further hearing on this case. Rule 27(B) as cited by the Petitioner is a subsection of Rule 27 of the Federal Rules of Appellate Procedure. It provides that motions addressed to a previous decision or order of the court or for the stay, recall or modification of any mandate or decision of the court . . . shall be referred by the clerk to the Judges who heard the appeal, normally without oral argument. (Petitioner's Brief A20). As a subsection of Rule 27, the Rule relied upon by Petitioner deals only with motions and not with judgments. A writ of certiorari is available only when sought from a judgment or decree, 28 U.S.C. Sec. 2101(c).

The only procedure available to the Petitioner after the decision of the United States Court of Appeals upholding the Summary Judgment was: (a) to within the framework of 28 U.S.C. Sec. 2101(C) seek a writ of certiorari, or, (b) within 14 days after the Summary Judgment was upheld by the

Court of Appeals to file a petition for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure.

Failing to do either, the petitioner's writ of certiorari is untimely. *Bird* v. *U.S.*, (CA Mass. 1957) 241 F.2d 516.

The purpose of statutes limiting the period of appeal is to set a definite point of time when litigation shall be at an end unless within that time, the prescribed application has been made and if it has not, to advise prospective appellees that they are freed from the appellant's demands. *Matton Steamboat Co.* v. *Murphy,* (NY 1943) 319 U.S. 412, 63 S. Ct. 1126.

More than five years has elapsed since petitioner lost his appeal to the United States Court of Appeals. Respondent, therefore, is entitled to the termination once and finally of this action.

II. DOES THE DECISION OF THE SUPREME COURT IN *LYNCH* v. *HOUSEHOLD FINANCE CORPORATION* SO CHANGE THE LAW OF THIS CASE THAT A NEW HEARING IS WARRANTED?

The judgment of the United States Supreme Court in *Lynch* v. *Household Finance Corporation,* 405 U.S. 538, 92 S. Ct. 1113, rehearing denied 92 S. Ct. 1611 (1972) simply was that the Federal courts did have jurisdiction of the subject matter and remanded the case to the District Court of Connecticut for further proceedings.

The District Court of Connecticut heard the case on remand, Judges Anderson, Timbers and Zampano presiding, and on January 12, 1973 filed their decision, which decision is presently unpublished, a copy of which is found in this brief at A1. The district court on remand found Connecticut's garnishment statute unconstitutional and held, "we hold that

Section 52-329 of the General Statutes of the State of Connecticut is unconstitutional and *"enjoin the defendant from taking any continuing or further action based upon the provisions of said statute"* (Emphasis added). The decision of the District Court appears to be prospective in nature as seen in the quoted language and would appear to have no retroactive application. We have ascertained that there is no appeal pending from this decision, which decision bears docket no. 13-737 and that the time for appeal being 30 days pursuant to Federal Rules of Appellant Procedure 4 (A), has passed.

Even if the court were to determine that this decision were to be retroactively applied and that the garnishment statute of the State of Connecticut was invalid at the time the events complained of by the petitioner occurred, this would not appear to in any way modify the prior decisions of the District Court and the Court of Appeals. In essence, the lower courts have held that in this case, no wrong was committed against the petitioner either under State or Federal law. (See Petitioner's Brief Appendix A14-17). Since no wrong was committed against the petitioner, it would appear that the retroactive application of the *Lynch* decision would have no substantive bearing on the lower courts decision.

A writ of certiorari lies within the sound discretion of the court. *Hyde* v. *Shine*, (Cal. 1905) 199 U.S. 62, 25 S. Ct. 760.

The ruling on a Motion for a new trial (which is analogous to petitioner's motions for recall) is discretionary and not reviewable in the federal courts. *Ward* v. *Joslin*, (NH 1902) 186 U.S. 142, 22 S. Ct. 807.

The Supreme Court though it stands ready to correct violations of Constitutional Rights, requires that the burden of showing essential unfairness be sustained by him who claims such injustice and that such burden be sustained not

as a matter of speculation but as demonstrable reality. *Beck* v. *Washington,* (Wash. 1962) 369 U.S. 541, 82 S. Ct. 955, rehearing denied 370 U.S. 965, 82 S. Ct. 1575. See also *Higgins* v. *Carr Bros. Co.,* (Me. 1943) 317 U.S. 522, 63 S. Ct. 337.

CONCLUSION

The Petitioner having failed to seek his writ of certiorari within the time provided and the petition itself not setting forth facts showng "essential unfairness", this respondent prays that petitioner's writ of certiorari be denied.

Respectfully submitted,

JEFFREY M. MINES
Counsel for Respondent
FLOYD BLACKMON

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CIVIL ACTION No. 13,737

DOROTHY LYNCH, on behalf of herself and all other persons similarly situated,

Plaintiff,

v.

HOUSEHOLD FINANCE CORPORATION, et al.,

Defendants.

BEFORE: ANDERSON, TIMBERS, *Circuit Judges,* and ZAMPANO, *District Judge*

MEMORANDUM OF DECISION FINDINGS OF FACT and CONCLUSIONS OF LAW

ANDERSON, *Circuit Judge:*

This class action challenges, on due process grounds, the constitutionality of the Connecticut pre-judgment foreign attachment or garnishment statute, Conn. Gen. St. § 52-329.[1] Jurisdiction is based upon 42 U.S.C. § 1983, 28 U.S.C. § 1343, and a three-judge District Court has been convened pursuant to 28 U.S.C. § § 2281, 2284.[2]

There is no factual dispute. The plaintiff, Dorothy Lynch, represents a class of persons, natural or otherwise, who are subject to Connecticut in personam jurisdiction and who have debts owing to them currently being garnished prior to judgment pursuant to § 52-329. The defendant, Household Finance Corporation, represents a class of persons who have garnished debts owing to the plaintiff class pursuant to § 52-329.[3]

Garnishment under the present Connecticut statutory scheme is simple. In bringing any action for money damages, the plaintiff need only insert in the writ a direction to the sheriff or constable to serve a copy of it upon any person indebted to the defendant or holding his goods. Once this is done, the goods or debt is secured in the garnishee's hands for payment of any judgment which the plaintiff might recover.

All of this takes place solely on the authority of the plaintiff's attorney as a Commissioner of the Superior Court, and without any prior notice to the defendant and without affording the defendant an opportunity to be heard. Furthermore, a garnishment may be released by the court only if it is excessive or if a bond is substituted, see, *e.g.*, *Harris* v. *Barone*, 147 Conn. 233, 158 A.2d 855 (1960); *Clime* v. *Gregor*, 145 Conn. 74, 138 A.2d 794 (1958).[4]

The due process clause of the Fourteenth Amendment incorporates a flexible concept into our Constitution, but at its core, it requires an opportunity for a hearing after due notice before a person is deprived of any significant property interest, except in very unusual situations.

The central requirements of due process have always been the giving of effective notice and the opportunity to be heard, see, *e.g.*, *Schroeder* v. *City of New York*, 371 U.S. 208, 212 (1962); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950); *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914); *Baldwin* v. *Hale*, 68 U.S. 223, 233 (1863). If there was ever any doubt, it is now settled that the opportunity to be notified and heard must be granted *prior* to the garnishment of the property, *Board of Regents* v. *Roth*, 408 U.S. 564, 569-70 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67, 80-82 (1972); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

When garnishment is instituted, the property taken is the *use* of one's funds or goods during the duration of the garnishment, see, *Sniadach, supra,* at 342 (Harlan, J., concurring). There is no doubt that this property interest is entitled to Fourteenth Amendment protection, even though the loss may be only temporary and a bond could be substituted, *Fuentes, supra,* at 85; *Bell, supra, at* 536. Moreover, due process is not limited to cases where basic necessities are taken; it is also required whenever there is a seizure of any significant property interest, *Fuentes, supra,* at 88-89.

There are unusual situations which permit a taking of property without a prior hearing, but these occasions have been limited to those in which there was an important public interest to be served, where there was a special need for prompt action, or where the seizure was initiated by a government official acting under a narrowly drawn statute, *Fuentes, supra,* at 90-92 (and cases cited therein).[5] The Connecticut statute in question, however, permits a private party to constrain or withhold from another that other's use of his own property for the purely personal interest of the private party making the garnishment, without any showing of the necessity for prompt action.

In holding the Connecticut garnishment statute unconstitutional for failure to provide a prior hearing, this court makes no attempt to delineate or describe the kind of notice that must be given or the type of hearing that must be held. That task rests in the hands of the legislature, see, *Fuentes, supra,* at 96-97; *Bell, supra,* at 542-43; *Goldberg* v. *Kelly,* 397 U.S. 254, 267 (1970). The Supreme Court has, however, indicated some factors which need to be considered.

The hearing that is required depends upon the circumstances, including the importance of the interests to be taken and the nature of the subsequent proceedings, *Roth, supra,* at 570, n. 8; *Boddie, supra,* at 378. It is not necessary that the

plaintiff fully establish his claim at the hearing, but he must at least show the probable validity of it, *Bell, supra,* at 540; *Sniadach, supra, at* 343 (Harlan, *J.*, concurring). What due process mandates is that there be a hearing "granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965), in order "to prevent unfair and mistaken deprivations of property," *Fuentes, supra,* at 97.

We hold that § *52-329* of the General Statutes of the State of Connecticut is unconstitutional and enjoin the defendants from taking any continuing or further action based upon the provisions of said statute.

Judgment may be entered in favor of the plaintiff with her costs.

Dated at New Haven, Connecticut, this 12th day of January, A.D. 1973.

ROBERT P. ANDERSON
United States Circuit Judge

WILLIAM N. TIMBERS
United States Circuit Judge

ROBERT C. ZAMPANO
United States District Judge

FOOTNOTES

[1]Conn. Gen. St. § 52-329 reads as follows:

> "When the effects of the defendant in any civil action in which a judgment or decree for the payment of money may be rendered are concealed in the hands of his agent or trustee so that they cannot be found or attached, or when a debt is due from any person to such defendant, or when any debt, legacy or distributive share is or may become due to such defendant from the estate of any deceased person or insolvent debtor, the plaintiff may insert in his writ a direction to the officer to

leave a true and attested copy thereof and of the accompanying complaint, at least twelve days in the case of the superior court or the court of common pleas, or six days in the case of the circuit court, before the session of the court to which it is returnable, with such agent, trustee or debtor of the defendant, or, as the case may be, with the executor, administrator or trustee of such estate, or at the usual place of abode of such garnishee; and from the time of leaving such copy all the effects of the defendant in the hands of any such garnishee, and any debt due from any such garnishee to the defendant, and any debt, legacy or distributive share, due or that may become due to him from such executor, administrator or trustee in insolvency, not exempt from execution, shall be secured in the hands of such garnishee to pay such judgment as the plaintiff may recover."

[2]This action was originally dismissed for lack of jurisdiction, *Lynch* v. *Household Finance Corp.*, 318 F. Supp. 1111 (D. Conn. 1970), but it is now before us on a remand from the Supreme Court, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972).

[3]This is a proper class action under F. R. Civ. P. 23 (b) (2), because an injunction and a declaratory judgment were the only relief sought. Notice to members of the classes was neither given nor required in this case, *Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940); see also, *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1 Cir. 1972); *Wilczynski* v. *Harder*, 323 F. Supp. 509, 512, n. 3 (D. Conn. 1971); *Solman* v. *Shapiro*, 300 F. Supp. 409, 411, n. 1 (D. Conn.) *aff'd* 396 U.S. 5 (1969); Comment of the Advisory Committee, 39 F.R.D. 69, 106-107 (1966); 3B J. Moore, Federal Practice ¶ 23.55, at 23-1152-53, ¶ 23.72, at 23-1421-22 (2d ed. 1969). The interests of the absent parties were fairly insured because there are no money damages, there is no factual issue to be resolved, counsel for the named parties adequately represent the interests of the classes, the Commercial Law League is a participant as an amicus curiae for the defendants, and the legal constitutional issue is not complex in light of recent Supreme Court decisions. Although it is suggested that dictum in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2 Cir. 1968), requires notice in all class actions, see Moore, *supra*, we read *Eisen* simply to say that notice is required in all class actions when due process so requires.

Furthermore, notice of the proceedings was given to The Governor and the Attorney General of Connecticut pursuant to 28 U.S.C. § 2284.

[4]For a more detailed description of the garnishment process, see *Lynch* v. *Household Finance Corp.* 405 U.S. 538, 552-555 (1972). Note also the description of the Massachusetts prejudgment attachment procedures, very similar to Connecticut's, held unconstitutional in *Schneider* v. *Margossian*, Civil No. 72-1421-G (D. Mass., filed Sept. 22, 1972).

[5]It may well be that garnishment necessary to secure jurisdiction in the state courts is an exception justifying the postponement of notice and hearing, *Fuentes*, *supra*, at 91, n. 23; *Ownbey* v. *Morgan*, 256 U.S. 94 (1921). Furthermore, an ex parte hearing might be sufficient if a creditor could show that there was an immediate danger that a debtor was going to conceal or abscond with his assets, *cf.*, *Fuentes*, *supra*, *at* 93.

§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Rule 40. Petition for Rehearing.

(a) TIME FOR FILING; CONTENT; ANSWER; ACTION BY COURT IF GRANTED. A petition *for rehearing* may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

Rule 4. Appeal as of Right — When Taken

(a) Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal re-

quired by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1277

ROBERT V. RAFTER,

Petitioner,

—v.—

FLOYD BLACKMON and KOIZIM and DAVIDOFF,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

G. WHITNEY BIGGS,
PULLMAN, COMLEY, BRADLEY & REEVES
855 Main Street
Bridgeport, Connecticut 06604
Attorneys for Respondents
Harvey Koizim and Jerry Davidoff

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In the

Supreme Court of the United States

October Term, 1972

No. 72-1277

Robert V. Rafter,

Petitioner,

—v.—

Floyd Blackmon and Koizim and Davidoff,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The respondents, Koizim and Davidoff, hereby oppose the petitioner's prayer for a writ of certiorari filed on March 17, 1973 and request that said petition be denied.

Opinion Below

The decision of the United States Court of Appeals for the Circuit in denying the petitioner's motion under Rule 27(b) of that Court is set forth in the petitioner's Appendix (Pet. App. A1).

Questions Presented

1. May the petitioner seek review of the denial of his motion to reinstate and reargue his appeal by the United States Court of Appeals for the Second Circuit after having

signed, subsequent to the decision of that Court on the original appeal, of a Covenant Not To Sue running to the benefit of the respondents?

2. May a petition for a writ of certiorari be filed 90 days after the denial by the United States Court of Appeals for the Second Circuit of a motion to reinstate and reargue an appeal decided by that Court more than five years previously?

3. Has the petitioner raised special and important reasons justifying review by this Court?

Statement of Case

The following sets forth the facts as they were presented to the United States District Court for the District of Connecticut and set out in the ruling of that Court on the motion for summary judgment of the respondents.

In December of 1964, the undersigned respondent attorneys were retained by Leo Spiegelman with respect to a claim involving the petitioner. The petitioner had leased property from Mr. Spiegelman, and a dispute had arisen over the payment of rent and damage to Mr. Spiegelman's property by the petitioner.

On December 10, 1964, Vincent S. Tirola, an attorney associated with the undersigned respondents, issued a writ, summons and complaint, returnable to the Court of Common Pleas, Fairfield County, at Stamford on the second Tuesday of January, 1965 naming Mr. Spiegelman as plaintiff and the petitioner as defendant. Service was made by the respondent, Floyd Blackmon, a deputy sheriff for Fairfield

County, who first made a garnishment of approximately $200 in the Fairfield County Trust Company, Norwalk, Connecticut and subsequently attachment of the petitioner's automobile, before making service upon the petitioner, all in accordance with the applicable Connecticut statutes.

The original writ, summons and complaint was thereafter filed in the Clerk's Office of the Court of Common Pleas at Stamford, also in accordance with the applicable Connecticut statute. Numerous motions were thereupon filed and ruled upon, and on May 13, 1965, the respondents withdrew that action, at the same time instituting an identical action against the petitioner, in which the identical garnishment, attachment and service upon the petitioner were made.

On May 31, 1966, the petitioner instituted action against the respondents herein, claiming that the respondents conspired to deprive the petitioner of certain of his civil rights by issuing and executing an invalid writ of attachment, wrongfully seizing his property, wrongfully withdrawing the first state lawsuit, improperly reattaching his property and by committing perjury in testimony before the Court of Common Pleas in the state action. That complaint appears in the Appendix to the petition herein (Pet. App. A8).

Denials of the material allegations of the petitioner's complaint were filed by the respondents, and after very extensive discovery, all respondents moved for summary judgment which was granted by Judge Zampano in a memorandum of decision dated April 26, 1967 (Pet. App. A12-A17). Judgment was entered dismissing the action the following day (Pet. App. A18).

The petitioner thereafter appealed to the United States Court of Appeals for the Second Circuit. Oral argument

was held on the appeal on November 30, 1967, and after full argument, the judgment of the United States District Court was unanimously affirmed from the bench (Lumbard, Medina and Hays, JJ). No review of that decision was sought by the petitioner until November 29, 1972, when he filed the motion to recall the mandate and for rehearing of the appeal (Pet. App. A2-A7). This motion was denied by an order of the Court on December 19, 1972 (Pet. App. 9).

On January 17, 1968, after the United States Court of Appeals for the Second Circuit had decided the petitioner's appeal from the United States District Court in this action, the state action in the Court of Common Pleas at Stamford was assigned. After settlement negotiations, the state action was disposed of and withdrawn. In connection with the settlement of the action in the Court of Common Pleas and in consideration of the withdrawal of that action, the petitioner signed and delivered a Covenant Not To Sue running to Harvey L. Koizim, Jerry Davidoff and Vincent Tirola, *inter alia*, in which the petitioner agreed to refrain forever from pressing any claim, demand, action or cause of action whatever against the respondents (Resp. App. A1).

Thereafter, on March 17, 1973, the petitioner filed the instant petition for a writ of certiorari.

POINT I

The petitioner, having given a Covenant Not To Sue to the undersigned respondents, cannot now pursue this action.

The petitioner gave a Covenant Not To Sue to the undersigned respondents on January 17, 1968 (Resp. App. A1). The effect of the giving of this covenant was to release the respondents, Koizim, Davidoff and their employee, Tirola, *inter alia* from any further claims whatever by the petitioner.

While under Connecticut law the effect of a Covenant Not To Sue is limited to those to whom the covenant is given, it is clear that a Covenant Not To Sue operates as a full release and discharge as to these persons. See *Bonczkiewicz* v. *Merberg Wrecking Corporation,* 148 Conn. 573, 581 (1961) and *Dwy* v. *Connecticut Co., et als.,* 89 Conn. 74 (1915), and cases cited therein.

The petitioner has, therefore, by his own act barred himself from making further claim against the undersigned respondents, and is, therefore, not entitled to pursue this petition as to them.

POINT II

The petitioner has not filed a timely petition for a writ of certiorari and, therefore, is not entitled to review.

The petitioner did not file a timely petition for a writ of certiorari within 90 days from November 30, 1967, the date on which the United States Court of Appeals entered its judgment affirming the decision of the United States District Court. 28 U.S.C. 2101(c). Nor was a timely motion for a rehearing filed with the Court of Appeals pursuant to the applicable rules, nor was the time for the filing of such a petition enlarged by any order. F.R.A.P. Rule 40(a), 28 U.S.C. The time for filing a petition for a writ of certiorari was, therefore, not extended. The time for review by this Court of the final judgment on the appeal to the United States Court of Appeals has, therefore, long passed.

In addition, the order entered on December 19, 1972 denying the petitioner's motion to recall the mandate and for a rehearing on his appeal was not reviewable. *Conboy* v. *First National Bank,* 27 S. Ct. 50, 203 U.S. 141, 51 L. Ed. 128 (1906); *Safeway Stores* v. *Coe,* 136 F.2d 771 (1943); see also, *Hines* v. *Seaboard Air Line Railroad Company,* 341 F.2d 229 (1965), F.R.C.P. 73(a), 28 U.S.C.; nor can the later filing of a motion for a rehearing revive the jurisdiction of this Court to entertain a petition for a writ of certiorari. *Chin Gum* v. *United States,* 150 F.2d 765 (1945). On these grounds, as well, the petition should be denied.

POINT III

The petitioner has not raised special and important reasons justifying review by this Court.

Even if the petitioner was able to surmount the hurdles stated hereinabove, his cause does not raise any issue warranting review by this Court.

The petitioner here states that he is seeking review of the denial of this motion for a rehearing. The purpose of a petition for rehearing is to direct the Court's attention to some material matter of law or fact which was overlooked at the time of the decision on the case, and which, had it been given consideration, would probably have brought about a different result in the case. See, for example, *National Labor Relations Board* v. *Brown & Root, Inc.*, 206 F.2d 73 (1953). In his motion for a rehearing, however, the petitioner failed to point out any matter of fact or law which was overlooked by the Court in deciding his appeal.

Review on writ of certiorari will only be granted where "special and important" reasons exist for the same, for instance where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals or where an important question of federal law has been decided which has not been settled by this Court. U. S. Sup. Ct. Rule 19, 28 U.S.C. Petitioner has raised no such issue in this case; rather, he admits that he seeks review of a garnishment and attachment released over five years ago, in a case in which he gave a Covenant Not To Sue to these respondents.

The decisions of the lower courts speak for themselves; they were correct applications of the law as the law existed at the time the decisions were rendered. The petitioner pursued his rights of review to the extent he wished at the time; he has not raised any important federal question here, and he is not entitled to review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

G. Whitney Biggs,
Pullman, Comley, Bradley & Reeves
855 Main Street
Bridgeport, Connecticut 06604
Attorneys for Respondents
Harvey Koizim and Jerry Davidoff

APPENDIX

COVENANT NOT TO SUE

I, ROBERT V. RAFTER of Weston, in the Count yof Fairfield and State of Connecticut for myself, my heirs, executors and administrators, in consideration of One Dollar and and Other Valuable Consideration to me paid by HARVEY L. KOIZIM, JERRY DAVIDOFF, VINCENT TIROLA, A. REYNOLDS GORDON, G. WHITNEY BIGGS, PULLMAN, COMLEY, BRADLEY & REEVES, and SIDNEY H. REICH of White Plains, New York the receipt of which is hereby acknowledged, do by this instrument covenant with said Attorneys forever to refrain from instituting, pressing or in any way aiding any claim, demand, action or cause of action for damages, cost, loss of service, expenses or compensation which against said persons I ever had, now have, or shall have or may have from the beginning of the world to the day and date of these presents; reserving, however, all rights against Deputy Sheriff Floyd E. Blackmon, the State of Connecticut, and all rights against all other persons, corporations, partnerships and associations, and legal entities of any kind whatsoever.

WITNESS my hand and seal this 17th day of January in the year 1968.

In presence of,

/s/ MARY C. CHALMERS

/s/ ROBERT V. RAFTER (L.S.)
Robert V. Rafter